

UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

JORGE DIAZ-DIEGO,	)	
Complainant,	)	
	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	Case No. 98B00037
	)	
	)	
ATRIUM HOTEL/AIRPORTER	)	<b>Marvin H. Morse,</b>
INN HOTEL, Respondent.	)	<b>Administrative Law Judge</b>

**ORDER TO SHOW CAUSE WHY DEFAULT JUDGMENT SHOULD NOT BE  
GRANTED AND ORDER OF INQUIRY  
(February 23, 1998)**

**Appearances:**        **Jorge Diaz-Diego, pro se**

**I.        Factual and Procedural History**

Jorge Diaz Diego (Diaz Diego or Complainant), a resident of Santa Ana, California, was born on August 26, 1961. On October 6, 1980, he applied for and was hired for the position of Bar Supervisor with the Atrium Hotel (Atrium or Respondent). Atrium fired him on May 21, 1997.

On either July 30, 1996,<sup>1</sup> or -- more probably -- July 11, 1997,<sup>2</sup> Complainant filed a Charge with the U.S. Department of Justice, Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC). The Charge described Complainant as having applied for naturalization on February 16, 1986, and as having been legally admitted for permanent residence as of October 20, 1987.

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<sup>1</sup>OCAHO Complaint at ¶ 18.

<sup>2</sup>OSC Charge at ¶ 10(a).

The Charge alleges that on **May 21, 1997**, his long-time<sup>3</sup> employer, committed document abuse by rejecting a “bad” social security number. Specifically, Complainant alleged that:

They rejected my social security number saying that I (,) Jorge(,) had utilized (used) a bad SS number (.) And I(,) Jorge(,) told them that I(,) gave Nancy my *good*<sup>4</sup> SS number. And I went to the Office of Social Security in Sta. Ana and I told them why they had fired me and they laughed and they said that all Nancy had to do was send a paper to the Social Security Office.

OSC Translation of Spanish Language Charge Form (emphasis added).

Complainant recites that on July 15, 1996, he filed an EEOC charge based on the same factual predicate, No. E-9697K-0071-00e/340969008, with the Santa Ana Office of the California Department of Fair Employment & Housing. (July 15, 1996, however, was almost a year *before* the more likely date of the allegedly discriminatory May 15, 1997 firing.) On July 17, 1997, the California Department of Fair Employment & Housing informed Complainant that there was “[n]o probable cause to prove a violation of the statute” and advised him of his right, absent a settlement agreement, to bring a civil action by July 8, 1998.

By determination letter dated November 21, 1997, OSC informed Complainant that “to date, we have not determined that there is reasonable cause to believe the charge [of document abuse] is true,” and advised that he could file a private action with the Office of the Chief Administrative Hearing Officer (OCAHO) within ninety (90) days of receipt.

On January 6, 1998, Complainant timely filed his OCAHO Complaint. The Complaint describes Diego Diaz as a work-authorized alien, born in Mexico, who applied for naturalization on **October 20, 1987**, and obtained his permanent resident status on **October 20, 1997**.<sup>5</sup> The

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<sup>3</sup>The OCAHO Complaint states that Diaz Diego worked as a Bar Supervisor for Atrium from October 6, **1980**, to May 21, **1997**, the date he was fired. If so, his hire predates enactment of the Immigration Reform and Control Act of 1986 (IRCA), enacting 8 U.S.C. § 1324b, and Atrium had no obligation under IRCA to check his work eligibility. If Diaz Diego was born on August 26, 1961, as his OSC Charge states, he would have been 19 years old when he was employed as a bar supervisor. The **seventeen** year interval between the putative date of hire and that of the alleged document abuse invites the inference that Complainant was not asked to produce his social security number as part of the employment eligibility verification process pursuant to 8 U.S.C. § 1324b. Numerous OCAHO decisions, cited in the Discussion, on page 3, hold that an employer is free to require a social security number as a condition of employment, and that a request for a card or number in a context other than that of the employment verification process does not implicate 8 U.S.C. § 1324b.

<sup>4</sup>This description of a “good SS number” implies the possibility of a “bad” SS number.

<sup>5</sup>This conflicts with Complainant’s OSC Charge, which states that he became a permanent legal resident on **October 20, 1987**, and sought naturalization on **February 16, 1986**. The similarity between the October 20, 1987, and October 20, 1997 dates appears unrealistic, and may be erroneous.

Complaint alleges citizenship discrimination. It states that Complainant was fired “for knowing more [than] anybody else” on May 21, 1997; that Respondent retaliated against him by “looking for me every sec. [sic] from the General Manager down to security;” and that Respondent refused to accept his social security number (although it was not requested for employment eligibility verification purposes). Complainant requests back pay from October 20, 1980, a date the significance of which is unexplained, but--according to the OSC Charge--is the date on which Complainant stated he became a permanent legal resident..

OCAHO issued a Notice of Hearing (NOH) on January 7, 1998. The U.S. Postal Service receipt confirms that Atrium received the NOH on January 13, 1998. The NOH instructed Atrium to answer within thirty (30) days of receipt. Atrium’s Answer, due on February 13, 1998, has not been filed. Atrium appears to be in default.

## **II. Discussion**

Complainant bases his allegation of citizenship discrimination on Atrium’s failure to accept his “good” social security number, but disclaims that Atrium requested this number as part of the work eligibility verification process. OCAHO jurisprudence has consistently held that an employer commits no legal wrong by obliging an employee to provide a valid, social security number. *See Austin v. Jitney Jungle Stores of America*, 6 OCAHO 923, at 9-10 (1997), 1997 WL 235918, at \*7 (O.C.A.H.O.); *Wilson v. Harrisburg*, 6 OCAHO 919, at 9 (1997), 1997 WL 242208, at \*7 (O.C.A.H.O.); *Boyd v. Sherling*, 6 OCAHO 916, at 16 (1997), 1997 WL 176910, at \*6 (O.C.A.H.O.); *Winkler v. Timlin*, 6 OCAHO 912, at 11-12 (1997), 1997 WL 148820, at \*10 (O.C.A.H.O.); *Toussaint v. Tekwood Assoc.*, 6 OCAHO 892, at 16-17, 1996 WL 6710179, at \*14, *aff’d*, 127 F.3d 1097 (3d Cir. 1997); *Lewis v. McDonald’s Corp.*, 2 OCAHO 383, at 5 (1991), 1991 WL 531895, at \*3-4 (O.C.A.H.O.) The Internal Revenue Code obliges an employer to ascertain this information.

It is unclear whether Complainant has standing to pursue his cause of action. This is so because of apparent inconsistencies and irregularities as to the dates of application for naturalization, in the context of the dates on which Complainant obtained legal residency. *See* 8 U.S.C. § 1324b(a)(1), which exempts employers of illegal aliens from the prohibition against discrimination based on national origin, and § 1324b(a)(3)(B), which precludes from coverage lawfully admitted aliens who fail to apply for naturalization within six months of the date on which the alien first became eligible for naturalization.

## **III. Order**

Atrium and Complainant shall provide the following information, supported by copies of relevant documents and by sworn affidavits:

### **A. At the Risk of Being Found in Default, Atrium Shall Answer the Complaint and Explain Its Failure To File Timely the**

**Answer.**

- B. Atrium Shall Supply Copies of All Documentation Relevant to Complainant's Immigrant and Work-Authorization Status, Including But Not Limited to Copies of Social Security Cards, Green Cards, and INS Documents, and INS Communications.**
- C. Atrium Shall Also Provide:**
- **a Narrative Description of Complainant's Employment History,**
  - **Its Reason for Firing Him, and**
  - **the Circumstances Under Which It Requested His Social Security Number.**
- D. Complainant Shall Provide:**
- **a Sworn Statement, in Which He Explains When He Arrived in the United States,**
  - **His Immigration Status at That Time and Thereafter,**
  - **the Date on Which He Was First Authorized To Work in the United States,**
  - **the Date on Which He Became a Permanent Resident,**
  - **the Date on Which He Applied for Naturalization,**
  - **Copies of All Documents Relevant to His Work-Authorization and Immigration Status, Including, but Not Limited, to:**
    - All Social Security Cards Used Since His Arrival in the United States, and**
    - All INS Work Authorization Documents.**

This material shall be filed no later than **March 23, 1998**.

SO ORDERED.

Dated and entered this 23rd day of February, 1998.

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Marvin H. Morse  
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Order to Show Cause Why Default Judgment Should Not Be Granted and Order of Inquiry, were mailed first class, this 23rd day of February, 1998, addressed as follows:

Complainant

Jorge Diaz-Diego  
3509 South Olive Street  
Santa Ana, CA 92707

Respondent

Atrium Hotel/Airporter Inn Hotel  
18700 MacArthur Boulevard  
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Attn: Daniel Monnet, General Manager

Office of Special Counsel

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Special Counsel for Immigration-Related  
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